EXPLANATORY MEMORANDUM TO

THE CONDITIONAL FEE AGREEMENTS (AMENDMENT) ORDER 2010

2010 No. [Draft]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order amends the Conditional Fee Agreements Order 2000 to reduce the maximum success fee percentage from 100% to 10% for all cases in relation to defamation proceedings providing for such fees.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Under sections 58 and 58A of the Courts and Legal Services Act 1990, all proceedings may be the subject of an enforceable conditional fee agreement (CFA) except specified family proceedings and most criminal proceedings. The Conditional Fee Agreements Order 2000 (S.I. 2000/823) specifies the proceedings to which a CFA must relate if it is to provide for a success fee, and the maximum amount of such a fee.

4.2 This Order, made under section 58(4) of the Courts and Legal Services Act 1990, amends the Conditional Fee Agreements Order 2000 to set a new maximum success fee percentage of 10% for all CFAs in relation to defamation proceedings providing for such fees.

5. Territorial Extent and Application

5.1 The Order applies to CFAs in England and Wales.

6. European Convention on Human Rights

6.1 The Under Secretary of State for Justice, Bridget Prentice, has made the following statement regarding Human Rights:

In my view the provisions of the Conditional Fee Agreements (Amendment) Order 2010 are compatible with Convention rights.

7. Policy background

- ***What is being done and why***

7.1 Conditional Fee Agreements (CFAs), a type of 'no win no fee' agreements, were first made enforceable in 1995 to improve access to justice for consumers of legal services. Changes introduced in the Access to Justice Act 1999 further extended their use to most types of civil cases and the financial incentives for lawyers to use CFAs. CFAs allow lawyers to take on a case on a 'no win no fee' basis. This means that if the case is lost, the lawyer does not get paid. However, if the case is successful, the lawyer can charge his costs as well as an additional uplift or "success fee". An after the event (ATE) insurance

market also developed to protect claimants against having to pay the opponents' costs and their own disbursements. Both the success fee and ATE insurance premium can currently be recovered from the losing side.

7.2 The Conditional Fee Agreements Order 2000 prescribes the maximum success fee that lawyers can charge at 100% in all categories of case, including defamation proceedings. That 100% maximum was intended to allow lawyers to cover the costs of those cases which were lost with a success fee from those which were won.

7.3 The Government has been concerned about the impact of high legal costs in defamation proceedings for some time, particularly the impact of 100% success fees, which can double the costs to unsuccessful defendants in cases funded under CFAs. There is some evidence to show that many more defamation claims win than justify such a generous success fee. This view is supported by Lord Justice Jackson's report, the *Review of Civil Litigation Costs: Final Report*, published on 14 January 2010 and available at http://www.judiciary.gov.uk/about_judiciary/cost-review/index.htm. The main flaw identified by Lord Justice Jackson of the current CFA regime with 100% success fees is the costs burden which it places upon the opposing side. Lord Justice Jackson recommends the abolition of the recoverability of success fees and ATE insurance premiums across civil litigation.

7.4 The Culture Media and Sport Committee (CMS) published the report of their inquiry into "Press Standards, Privacy and Libel" on 24 February. The Committee concludes that the CFAs costs in defamation cases are too high and suggests that the recoverability of success fees from the losing party should be limited to 10%, leaving the balance to be agreed between the client and solicitor.

7.5 The Order therefore seeks to reduce the maximum success fee in defamation cases to 10%. Defamation proceedings for the purposes of this Order covers defamation, malicious falsehood or breach of confidence involving publication to the public at large. This is intended as an interim measure while the Government gives detailed consideration to the recommendations from Lord Justice Jackson (which would require primary legislation) as well as the CMS Committee's proposal for reform. However, in the meantime the proposal to reduce the maximum success fee to 10% would help control the costs in defamation cases and limit the potential harmful effect very high costs could have on the publication decisions of the media and others.

7.6 The Order will limit the maximum success fee to 10% in all defamation cases which are entered into after the coming into force of the Order.

- ***Consolidation***

7.7 None

8. Consultation outcomes

8.1 The Ministry of Justice carried out a four week consultation on the proposal to reduce the maximum success fee in defamation proceedings from the currently prescribed 100% to 10% from 19 January to 16 February 2010. A draft Order was included with the consultation paper. As required by Section 58A (5) of the Courts and Legal Services Act 1990, the Lord Chancellor consulted the designated judges, the General Council of the Bar, the Law Society and such other bodies that he considered to have an interest in the Order. The Order was amended in the light of comments received to ensure that the new reduced fees would only apply to CFAs entered into after the Order comes into force. No other comments were received in relation to the Order.

8.2 A response to the consultation was published on 3 March and is available at www.justice.gov.uk. A total of 57 responses were received, out of which more than half (53%) - mainly those representing the media's interests - supported the proposal to reduce the success fee in defamation cases to 10%. 47% opposed the proposal with most saying that although they did not support the status quo, they did not agree with the specific proposal of reducing the fee to 10%.

8.3 As the issue being consulted on (the level of success fee in defamation cases) was narrow and clearly set out in the consultation paper, four weeks was considered adequate time within which to consider it. Government had previously sought views on proposals for a scheme on fixed recoverable success fees and ATE insurance premiums in the Consultation Paper, *Conditional Fee Agreements in Defamation Proceedings – Success Fees and after the Event Insurance*, during 2006. However, full agreement could not be reached on the details of the scheme and the scheme was not implemented. Other measures aimed at reducing costs in individual cases were implemented on 1 October 2009 following the consultation, *Controlling Costs in Defamation Proceedings*, although these did not include specific action on success fees. As previous attempts to control the success fees proved unsuccessful the Government is taking forward this proposal.

9. Guidance

9.1 We do not consider that any guidance is necessary in respect of the order.

10. Impact

10.1 There will be some impact on business, but no impact on charities or voluntary bodies.

10.2 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The Order applies to and will affect small business.

12. Monitoring & review

12.1 The Order will be reviewed after 12 months. The Department is also considering Sir Rupert Jackson's proposal in detail and will review this Order in light of any proposed reform in respect of CFAs.

13. Contact

Iram Akhtar at the Ministry of Justice Tel: 020 3334 4202 or email: iram.akhtar@justice.gsi.gov.uk who can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency:	Title:	
Ministry of Justice	Impact Assessment of Controlling Costs in Defamation Proceedings – Reducing CFA Success Fees	
Stage: Final decision	**Version:** 1	**Date:** 1 March 2010

Related Publications: **Controlling Costs in Defamation Proceedings (CP4/09) & Conditional Fee Agreements in Defamation Proceedings – Success Fees and After the Event insurance (CP1/2010)**

Available to view or download at:

http://www.justice.gov.uk

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What is the problem under consideration? Why is government intervention necessary?

Media organisations claim that the high costs in defamation and some other publication-related proceedings funded under Conditional Fee Agreements (CFAs) are a potential threat to freedom of expression. The issue is whether high legal costs, combined with 100% success fees, which are currently recoverable from the losing side, put publishers under excessive pressure to settle weak and unmeritorious claims when doing so is not in the public interest. This affects not only the media, but also scientific and academic debate. Such an effect may be greater in relation to those with smaller budgets such as the local media and small publishers. Current measures, including voluntary arrangements adopted by some solicitors and media organisations, have proved inadequate to control the high costs in this area.

What are the policy objectives and the intended effects?

The aim of this proposal is to reduce legal costs in defamation and some other publication-related proceedings brought under CFAs, with a view to making them more proportionate and reasonable. The proposal aims to reduce the risk of disproportionate costs encouraging the press and other groups to settle cases in such a way as to restrict the freedom of expression unjustifiably.

What policy options have been considered? Please justify any preferred option.

The following options are being considered:

0. Base case ("do nothing").
1. Reducing the maximum prescribed success fee that can be charged in defamation proceedings from 100% to 10%. This would be achieved by amending the Conditional Fee Agreements Order 2000, which sets the current maximum success fee at 100%.

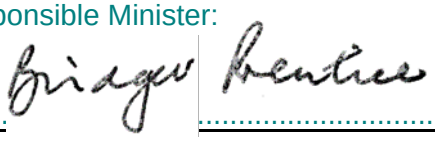
When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The proposals should be reviewed after 12 months.

Ministerial sign-off For final decision stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:



.....Date: 3.03.2010

Summary: Analysis & Evidence

Policy Option: 1	Description: Reduce the maximum success fee that may be charged in defamation and some other publication related proceedings from 100% to 10%

COSTS

ANNUAL COSTS	Description and scale of **key monetised costs** by 'main affected groups'
One-off (Transition) **Yrs**	
£	
Average Annual Cost (excluding one-off)	
£	**Total Cost** (PV) **£ N/A**

Other **key non-monetised costs** by 'main affected groups' Reduced access to justice for potential claimants, reduced testing of the legal boundary of what constitutes defamatory publication, reduced caseload and/or reduced income and/or reduced profits for CFA lawyers, possibly increased legal aid spending.

BENEFITS

ANNUAL BENEFITS	Description and scale of **key monetised benefits** by 'main affected groups'
One-off **Yrs**	
£	
Average Annual Benefit (excluding one-off)	
£	**Total Benefit** (PV) **£ N/A**

Other **key non-monetised benefits** by 'main affected groups' The media and others would be subject to fewer defamation cases and/or to reduced costs in defamation cases they lose. This may lead to an increased amount of related information published.

Key Assumptions/Sensitivities/Risks The key assumption is that it would be in society's interests for the media and others to publish information which, whilst previously possibly being subject to legal challenge, is in the public interest to publish. The proposals seek to achieve this by reducing the prospects of legal challenge in all but the most certain cases, and to do so by reducing CFA success fees.

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) £	**NET BENEFIT** (NPV Best estimate) £

What is the geographic coverage of the policy/option?				England and Wales
On what date will the policy be implemented?				April 2010
Which organisation(s) will enforce the policy?				Courts
What is the total annual cost of enforcement for these organisations?				N/A
Does enforcement comply with Hampton principles?				N/A
Will implementation go beyond minimum EU requirements?				N/A
What is the value of the proposed offsetting measure per year?				N/A
What is the value of changes in greenhouse gas emissions?				N/A
Will the proposal have a significant impact on competition?				No
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	**Net Impact** £

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Evidence Base (for summary sheets)

1. Scope of the Impact Assessment

1.1 This Impact Assessment relates to the consultation on a proposal for controlling costs in defamation proceedings[1] funded under Conditional Fee Arrangements (CFAs). CFAs are 'no win no fee' agreements which operate on the assumption that a lawyer (normally a solicitor) will usually act for a client only if he thinks there are sufficient prospects of success. If the case is lost, then the lawyer will not be paid. If the case is successful, the lawyer will be able to claim an 'uplift' on his normal fees. This uplift is also known as the 'success fee'. This maximum permitted uplift that lawyers can charge their client is currently prescribed[2] at 100%. An 'After the Event' (ATE) insurance market has developed to protect claimants against having to pay the opponent's costs and their own disbursements, if the case was unsuccessful. Both the success fee and ATE insurance premium can be recovered from the losing side.

1.2 This Impact Assessment considers the costs and benefits of the proposal in the consultation paper, *Controlling Costs in Defamation Proceedings – Reducing CFA Success Fees*. It is undertaken in line with the criteria set out in the Government's Impact Assessment guidance.[3]

Scope of the proposals

1.3 The consultation paper seeks views on the following options:

0. Do nothing.

1. Reducing the maximum success fee that may be charged in defamation proceedings from 100% to 10%.

Organisations affected

1.4 The main groups likely to be affected by the proposal are:

- Claimants in defamation proceedings funded by CFAs. Defendants may use CFAs as well.

- Publishers, in particular the media. Media organisations and other publishers are often involved as defendants in defamation proceedings. This may include national and regional newspapers, magazines, book publishers, internet service providers, non-departmental public bodies, academic/scientific bodies, charities and any other organisation publishing reports or information.

- Legal representatives, particularly solicitors firms, specialising in this area of law, of which a significant number are small and medium size businesses but also barristers.

[1] As defined in the consultation paper, Controlling costs in Defamation Proceedings – Reducing CFA Success Fees at page 10, para 5

[2] The Conditional Fee Agreements Order 2000 (SI 2000/823)

[3] http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44199.html

- The civil courts dealing with defamation proceedings (including on costs assessment) where there may be an issue as to whether there has been compliance with any new rules. There are 216 County Courts in England and Wales. The measures would also apply to cases proceeding in the High Court, the Court of Appeal and the Supreme Court.

2. Rationale for Government Intervention

2.1 In terms of probability if CFA lawyers focused evenly on all cases of possibly defamatory publication then in theory we might assume that they would win 50% of cases. If this were so, and if their standard fees reflected their costs, then these lawyers would recover their costs if they were able to charge a 100% 'uplift' or 'success fee' on their standard fees. This is the theoretical rationale for having 100% success fees. This analysis also assumes that costs in all cases are identical.

2.2 A lower maximum success fee might require CFA lawyers to achieve higher case success ratios in order to break even. As a result CFA lawyers might only focus on cases which they are more likely to win. In the above scenario a 10% success fee would require a case success ratio of over 90% in order to break even. As a result CFA lawyers would probably not take on some cases which they might have taken on beforehand. Some of these cases are unlikely to be self-funded in the absence of a CFA.

2.3 If the claimant was supported by a CFA lawyer, and if the defendant was self-funded, then the outcome might be that more material is published. In particular, material which might have been subject to a legal challenge beforehand which was not very likely to succeed. Ministers consider that it would be in the public interest for such material to be published without the publisher being threatened by legal challenge. The rationale for the reforms is to achieve this Ministerial objective.

3. Cost Benefit Analysis

3.1 This section sets out some potential costs and benefits of various options under consideration.

BASE CASE ("Do nothing")

Description

3.2 Making no change would result in a continuation of the status quo, as described earlier in this Impact Assessment.

3.3 Because the base case is compared with itself in this Impact Assessment its net costs and benefits are zero.

OPTION 1

Description

3.7 **This option would reduce the maximum success fee that can be charged in defamation proceedings from 100% of the lawyer's basic costs to 10%. Defamation proceedings for the purpose of the Order means publication proceedings (within the meaning of rule 44.12B of the Civil Procedure Rules 1998) which includes defamation, malicious falsehood or breach of confidence involving publication to the public at large. This would be achieved via amending the Conditional Fee Arrangements Order 2000 which prescribes the maximum success fee at 100%. The 10% success fee could still be recoverable in defamation cases**

from the defendant in any case the claimant won, along with their legal representative's basic costs, disbursements and any ATE insurance premiums.

3.8 The following analysis applies to situations where a claimant is supported by a CFA lawyer and a defendant is self-funded.

Costs

3.9 There may be reduced access to justice for potential claimants whose cases are less likely to succeed, as CFA lawyers may no longer take on such cases.

3.10 These potential claimants might also suffer detriment as a result of being unable to challenge information which they consider to be defamatory. This may reduce protection under Article 8 of the European Convention on Human Rights (the right to private and family life).

3.11 There may be reduced testing in court of the legal boundary of what constitutes defamatory publication as a result of CFA lawyers no longer getting involved in such cases. This might not be in the public interest.

3.12 CFA lawyers are likely to be worse off either because they have to charge lower success fees and/or because they get involved in fewer cases.

3.13 Although legal aid funding is not normally available for defamation proceedings, there could be an increase in applications for exceptional legal aid funding as fewer claimants would be able to fund their cases through CFAs. This could impose costs on the legal aid budget.

3.14 There may be increased costs to the public in terms of misleading published information, which might be challenged less in the future.

Benefits

3.15 The media and other publishers (including scientists and academics) would benefit from being subject to the threat of proceedings and fewer defamation proceedings, especially cases where the probability of the claimant winning are low. In the event of losing a case the media would also benefit from paying lower CFA lawyer success fees. Of relevance to this is Article 10 of the European Convention on Human Rights (the right to freedom of expression).

3.16 More material might be published which is in the public interest to see.

4. Enforcement and Implementation

4.1 Option 1 would be implemented by amending the Conditional Fee Agreements Order 2000.

5. Impact Tests

5.0 The following impact tests were considered applicable to the proposal:

Competition Assessment

5.1 It is likely that limiting the recoverable costs under CFAs would deter some solicitors from taking on defamation cases. This would impair competition and reduce consumer choice. Reduced competition could, in the long term, increase costs both for claimants and defendants. We are aware that this is a specialised area of the law where the number of solicitors practising is limited.

5.2 As such this proposal is unlikely to directly or indirectly limit the number or range of suppliers, limit the ability of suppliers to compete, and limit suppliers' incentives to compete vigorously.

Small Firms Impact Test

5.3 Many solicitors firms operating in the field of defamation proceedings are small to medium sized businesses including self-employed barristers. As above, it is likely that limiting the recoverable costs under CFAs would deter some solicitors (and barristers) from taking on defamation cases. We have considered whether it would be possible to exempt small legal firms including the self-employed from these proposals. However we have concluded that this would be impossible both from a practical point of view and because it would reduce the efficacy of the proposals. It would also be likely to distort the market for legal services in this area. An open public consultation exercise sought views on what actions might be needed to avoid or reduce this adverse impact on small business. This did not lead to any proposals emerging.

5.4 The other small firms affected might be those involved in publishing material which might be subject to defamation proceedings. This might include local newspapers and not for profit organisations. They might be expected to benefit from the proposals as material which might have been legally challenged before might not be challenged in the future.

5.5 On the other hand other small firms which might wish to issue defamation proceedings might be worse off following these proposals, as it might be harder for them to find a CFA lawyer who wishes to take on their case. As above an open public consultation exercise sought views on what actions might be needed to avoid or reduce this adverse impact on small business. This did not lead to any proposals emerging.

Legal Aid and Justice Impact Test

5.6 Although legal aid is not generally available for defamation proceedings, claimants may apply for exceptional legal aid funding in these cases. Any reduction in the availability of CFAs in this category of case may lead to an increase in applications for exceptional legal aid funding under Section 6(8)(b) of the Access to Justice Act 1999 which, if granted, would have an impact on the legal aid fund. We estimate that there would be only a small number of cases per year, however these could prove individually costly.

Equality Impact Assessment

5.7 The proposal will affect all claimants, defendants and businesses involved in legal proceedings funded by CFAs in this area of law. An initial equality impact screening

considered their impact on different groups in terms of; disability; gender; age; religion and belief; and sexual orientation.

5.8 As mentioned it is likely that limiting the recoverable costs under CFAs would deter some solicitors from taking on defamation cases. As such some people with lower financial means may no longer be able to pursue defamation cases. This cost in terms of reduced access to justice might fall disproportionately on ethnic minority groups and on disabled people as these groups are disproportionately of lower means.

Human Rights

5.9 The proposal aims to reduce the risk that in some defamation proceedings funded under CFAs, the litigation costs could be so high as to restrict the media and other publishers' freedom to publish. Of relevance to this is Article 10 of the European Convention on Human Rights (the right to freedom of expression).

5.10 However, the proposal could potentially reduce the availability of CFAs in defamation proceedings. This could result in cases of defamation, libel and invasion of privacy not being addressed. This may reduce protection for claimants under Article 8 of the Human Rights Act (right to respect for private and family life) and may also lead to the public being misinformed. The rights of claimants under Article 6 might also be affected (the right to access to justice).

Other Specific Impact Tests

5.11 The proposal should not involve impacts relating to the other specific impact tests.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	***Results in Evidence Base?***	***Results annexed?***
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

6.